REGINA NAVAMONEY D.T. PERIATHAMBY

v.

JOSEPH VARGHESE

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 820/85]
24 DECEMBER 1986

CONTRACT: *Sale and purchase agreement - Flat - Deposit paid - Suit to rescind the agreement - Counterclaim - Breach of agreement - Conditions of agreement - Whether fulfilled - Time of the essence to agreement.*

CIVIL PROCEDURE: *Application for judgment under O. 81 r. 1 - On ground no defence to action - Whether application should be allowed.*

In this suit the plaintiff sought to rescind the sale and purchase agreement she had entered into with the defendant on 29 January 1985, the return of the RM10,000 deposit paid under the agreement with interests calculated at the prevailing banking rate and costs. In disputing the suit, the defendant alleged that the plaintiff had breached the agreement and counterclaimed the deposit sum of RM10,000 as agreed liquidated damages, RM2,000 as out of pocket expenses, interests and costs. Following the filing of a reply and a defence to the counterclaim, the plaintiff proceeded to apply for judgment under O. 81 r. 1 on the ground that the defendant had no defence to the action.

On 29 January 1985 the plaintiff executed the sale and purchase agreement to purchase the defendant's flat in Jalan Brickfields, free from all encumbrances, together with fixtures and fittings and with vacant possession for a consideration of RM100,000. At the time of sale, there was no issue of a separate title over the property and it formed part of the Master Title which was registered in the name of the developer from whom the defendant had purchased the flat. The developer had no objection to the sale of the flat to the plaintiff.

To settle the balance of RM90,000 the plaintiff was to obtain a loan from her employer (the Government of Malaysia). The agreement was conditional upon the defendant obtaining the necessary consent to sell from the developer within 60 days from the date of the agreement. Thus the defendant had until 30 March 1985 to obtain the developer's consent.

The defendant denied that the developer's consent should be in the format required by the Government of Malaysia from whom the plaintiff had applied for the loan to finance the purchase of the property. In this respect, the defendant affirmed that he was never aware of the identity of the plaintiff's employer.

Held:

[1] From the affidavit of the Estate agent it was clear that the defendant was aware that the plaintiff would be applying for a loan from her employer, and that he also knew the identity of the plaintiff's employer to be the Government of Malaysia.

[2] Being a Government servant himself, the defendant should have fully appreciated the fact that as a lender, the Government would impose conditions for such a loan, the terms of which are set up in the format called "Lampiran A" which is an undertaking to be given by the developer that it would

(a) allow the Government to lodge a caveat on the Master Title;

(b) execute a deed of assignment in favour of the Government and that no further assignments will be executed in favour of other third parties without the prior approval of the Government;

(c) transfer the property in the name of the Government once a separate title has been issued.

[3] As the developer had already assigned the Master Title to Malayan Banking Berhad to secure a loan, it was not prepared to execute any further assignments in favour of any other financial institutions or agreeable to the property being caveated unless its bankers were agreeable to such actions. Thus, when the plaintiff forwarded copies of the assignment to be signed, the developer refused to do so unless certain amendments were made, which were in no way in compliance with the Government's terms as contained in "Lampiran A".

[4] Since the defendant was aware all along that the Government of Malaysia was to finance the purchase and since the property to be transferred must be free of all encumbrances, the developer's consent as stipulated in Clause 11(a) of the agreement must invariably refer to the process of obtaining a loan from the Government which requires the execution of "Lampiran A" by the developer.

[5] Since the defendant had failed to get the developer to execute "Lampiran A" within the time limited in Clause 11(a) and since time was of the essence to this agreement (Clause 11(g)), the Court ruled that it was the defendant who had breached the agreement.

[6] As the defendant had breached the agreement, the plaintiff must therefore succeed in her application for judgment under O. 81 r. 1 in terms of her application dated 22 March 1986.

[Judgment for plaintiff.]

For the plaintiff - Atma Singh Veriah; M/s. Atma Singh Veriah & Co.
For the defendant - M. Varughese; M/s. T.M. Varughese & Co.

JUDGMENT

Siti Norma Yaakob J:

In this suit the plaintiff seeks to rescind the sale and purchase agreement she had entered into with the defendant on 29 January 1985, the return of the RM10,000 deposit paid under the agreement with interests calculated at the prevailing banking rate and costs. In disputing the suit, the defendant has alleged that the plaintiff had breached the agreement and counterclaimed the deposit sum of RM10,000 as agreed liquidated damages, RM2,000 as out of pocket expenses, interests and costs. Following the filing of a reply and a defence to the counterclaim, the plaintiff proceeded to apply for judgment under O. 81 r. 1 on the defendant has no defence to the action.

In resisting the application, the question as to whether the conditions of the agreement had been fulfilled became an issue and to consider this, I shall now deal with the various clauses of the agreement to determine the rights and obligations of either party.

On 29 January 1985, the plaintiff executed the sale and purchase agreement to purchase the defendant's flat No. 20A, Apartment Cuepacs, Jalan Thamby Abdullah, Off Jalan Brickfields, built on land held under C.T. 16088 - 16098 for Lots 158 - 168 in s. 95 Town of Kuala Lumpur (the property), free from all encumbrances, together with fixtures and fittings and with vacant

possession for a consideration of RM100,000. At the time of the sale, there was no issue of a separate title over the property and it formed part of the Master Title and that it was registered in the name of Syarikat Perniagaan CUEPACS Bhd. (the developer) from whom the defendant had purchased in the first place. However, the developer had no objection to the sale of the property to the plaintiff as evidenced by its letter dated 24 January 1985, pursuant to a request made by the defendant which is acknowledged in para. (3) of the preamble to the agreement.

It is not disputed that a week before the execution of the agreement, the plaintiff paid RM1,000 to the defendant directly as earnest money and deposited a further RM9,000 towards the purchase price with Messrs. Krishna Menon & Partners, a firm of solicitors who were acting for them in this transaction, as stakeholder, pending the obtaining of a letter of consent by the defendant from the developer. This is spelt out in Clause 1 of the agreement and it is also not disputed that the plaintiff had authorised payment out of the RM9,000 to the defendant even before the consent of the developer had been obtained by the defendant. Under Clause 2 of the agreement, the plaintiff was to settle the balance of the purchase price within 90 days of the date of the defendant's notification to their common solicitors of the developer's consent to transfer. To settle the RM90,000, the plaintiff was to obtain a loan from her employers and in the event the loan was not approved within the time stipulated in Clause 1, the plaintiff would grant the defendant another 30 days to obtain the consent (Clause 3).

Clause 11(a) of the agreement goes further to state that the agreement is conditional upon the defendant obtaining the necessary consent to sell from the developer within 60 days from the date of the agreement. Thus the defendant had until 30 March 1985, to obtain the developer's consent.

Now what is this consent? The defendant contends that the consent is nothing more than the developer's approval for the defendant to sell the property to the plaintiff which had already been issued by the developer in its letter dated 24 January 1985 and exhibited as RN 13(A) to the plaintiff's affidavit dated 22 March 1986. This written consent had been intimated to the plaintiff by letter dated 27 March 1985, well within the 60 days limitation period and since it was the plaintiff who had failed to settle the balance of the purchase price within the time limited in clause 2, the plaintiff had, therefore, breached the agreement and the defendant was entitled to forfeit the deposit by way of agreed liquidated damages under Clause 11(e).

The defendant denies that the developer's consent should be in the format required by the Government of Malaysia from whom the plaintiff had applied for the loan to finance the purchase of the property. In this respect, the defendant affirmed that he was never aware of the identity of the plaintiff's employers. I pause here to consider this denial and to determine to what extent the defendant can be believed when he affirmed to that effect. In their affidavits, both the plaintiff and the defendant had agreed that they were introduced to each other by an Estate agent, one Simon Fernandez, who has also affirmed that he had introduced the plaintiff to the defendant as a teacher with Sekolah Alam Shah, Cheras. When the defendant inquired how she proposed to settle payment of the property, the plaintiff had, in the presence and the hearing of the Estate agent, informed the defendant that she would be applying for a Government loan to finance the purchase. I have no reason to doubt the truth of the Estate agent's affidavit which is not questioned by the defendant. To that extent I consider that not only was the defendant aware that the plaintiff would be applying for a loan from her employer (Clause 3), but that he also knew the identity of the plaintiff's employer to be the Government of Malaysia.

As a Government servant himself, (he has given the Ministry of Foreign Affairs as his forwarding address), the defendant should also fully appreciate the fact that as a lender, the Government would impose conditions for such a loan, the terms of which are set up in the format called "Lampiran A" which is an undertaking to be given by the developer that it would

(1) allow the Government to lodge a caveat on the Master Title.

(2) execute a deed of assignment in favour of the Government and that no further assignments will be executed in favour of other third parties without the prior approval of the Government.

(3) transfer the property in the name of the Government once a separate title has been issued.

However, at the time of sale, the developer had already assigned the Master Title to Malayan Banking Berhad to secure a loan, and as such, it was not prepared to execute any further assignments in favour of any other financial institutions or agreeable to the property being caveated unless its bankers were agreeable to such actions. Thus, when the plaintiff forwarded copies of the assignment to be signed, the developer refused to do so unless certain amendments were made, which were in no way in compliance with the Government's terms as contained in "Lampiran A".

All this while, the defendant had acted on the basis that "Lampiran A" had to be executed by the developer and realising that time was catching up on him, he had, by letter dated 20 March 1985, applied for an extension of 3 weeks from the plaintiff to obtain the developer's consent. The plaintiff, by letter dated 27 March 1985, reluctantly agreed, provided that the request for extension was a final one and that her rights under the agreement were in no way prejudiced. On the same day too the defendant wrote to their common solicitors, stating for the first time, that the undertaking sought in "Lampiran A" does not form part of the agreement and relied on the developer's letter of consent dated 24 January 1985 as fulfilling his obligations under Clause 11(a). Up to 27 March 1985, the defendant had never treated the developer's letter as the consent required by the plaintiff to obtain her loan. The consent itself was granted before the agreement was executed and it states nothing more than that the developer agreeing to the defendant's request to transfer the property subject to the payment of certain fees and dues. However, in such circumstances, the property to be transferred would be an encumbered one which is contrary to what the defendant had agreed to transfer - a property free from all encumbrances. Thus the consent given by the developer dated 24 January 1985 cannot possibly be the consent that was envisaged by Clause 11(a) when read with Clause 2 and 3. If indeed it was, I do not see the necessity of including Clause 11(a) into the agreement. Since the defendant was aware all along that the Government of Malaysia was to finance the purchase and since the property to be transferred must be free of all encumbrances, the developer's consent as stipulated in Clause 11(a) must invariably refer to the process of obtaining a loan from the Government which requires the execution of "Lampiran A" by the developer. Since the defendant had failed to get the developer to execute "Lampiran A" within the time limited in Clause 11(a) and since time is of the essence to this agreement (Clause 11(g)), I had ruled that it was the defendant who had breached the agreement and the plaintiff must therefore succeed in her application for judgment under O. 81 r. 1 in terms of her application dated 22 March 1986.

Also found at [1987] 1 CLJ 68